

1760.

BY THE COURT. This Rum appears to have been sent to satisfy P's Debt. If it had been Money, there could have been no doubt but the Defendant would have retained it. And the only difference is that a Commodity was sent which must be converted into Money, before the Sum to be paid to P. could be ascertained, but, as to P's interest in it, the Case was the same. Therefore judgment, by the whole Court, was given for the Defendant.

Chew and Molana pro Quer.—Galloway and Dickenson pro Def.

The Lessee of ASHTON versus ASHTON.

Present LAWRENCE GROWDON } Justices.
WILLIAM COLEMAN. }

ON special Verdict. Devise to the *first Heir Male* of I. S. *when* he shall arrive to the Age of 21 Years, *he paying* to A. and B. the Daughters of I. S. £. 40 each.—*After Devisee's Death* I. S. had a Son, who attained the Age of 21 Years, and paid his Sisters the £. 40 each.

The Question was, whether the Son of I. S. could take by executory Devise?—It was objected for the Defendant, 1st. That this being a present Devise it could not take Effect because to a Person not *in esse*. 2d. That though it might be construed a future Devise, yet it was too remote; for an executory Devise must take effect within the Compass of a Life or Lives *in esse*, or at farthest within nine Months after: And in this case I. S. might have had no Son but a Daughter, who might have had a Daughter, who might have had a Son, who would have been the *first Heir Male* of I. S. which would have been too remote a Contingency, and would have tended to a Perpetuity. And the Case must be considered as at the Time of making the Devise, that is, how it might be; and not how it has actually happened. 3d. That the Son of I. S. could not take, because the Limitation was to the *first Heir Male* and *Nemo est Hæres Viuentis*.

For the Plaintiff it was answered: 1st. That this was no present Devise, the Testator taking Notice that I. S. had no Son born by the Word *first Heir Male*, and using the Words *when* and *paying*.—2d. That this Contingency was not too remote, because the Testator by the Words *first Heir Male*, must have meant *first Son*; and that such a Construction must be made as to carry the Intent of the Testator into Execution.—3d. *First Heir Male* are Words of Purchase and *Designatio Personæ*, and the Law will supply the Words of the Body in a Will.

BY THE COURT. The Intent of the Testator is clear, that the first Son of I. S. should take. Therefore judgment BY THE COURT.

Cases cited; 1 Lord Raym. 207 1 Salk 229. Talbot's Cases 44. 50. 145. 1 Vern 729. Vin Dev. 315. 2 Vent 311. 1 Peer. Williams 229. 2 Co. 20. 2 Peer. Williams 196. 2 Salk 621.

*Chew pro Quer. Moland and Dickenson pro Def. ** April

* See 12 Mod 279. 287. 1 Inst. 24.